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# How to Undo the Trump-Era Regulatory Rollbacks to Redo Environmental Protection

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## Introduction

How can a new administration reinstate and strengthen the environmental regulations that the Trump administration has rolled back?

It depends. Each rule has a different timeline, legal justification, and litigation history that affects how it can be reversed or modified. A new administration will have the power to undo some of the rollbacks quickly and easily. Other rollbacks may be difficult or impossible to undo. With a simple majority in both chambers, Congress can pass a resolution invalidating agency rules that were finalized towards the end of the administration. Agencies can also revise or rescind final rules, but their latitude to do so depends on litigation outcomes. Some judicial decisions could restrict how an agency can regulate a particular issue. On the other hand, agencies can easily modify proposed rules, guidance documents, and policy memos. A new president can also rescind previous executive orders and issue new ones.

In the following sections, we detail how a future administration can modify the Trump-era regulatory rollbacks, based on the status of a given action in the administrative process, from final rules pre-litigation, in litigation and post-litigation to proposed rules, executive orders, and guidance memos.

## Final Rules

A future administration can modify or rescind final rules, as long as the agencies sufficiently justify the change and the new rules are consistent with the authorizing statutory language. [The Administrative Procedure Act \(APA\)](#) sets out the process for rulemaking to ensure that an agency's action is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The APA [allows for judicial review](#) to determine if agency action meets this standard. In [Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 US. 29 \(1983\)](#), the Supreme Court determined that the "arbitrary and capricious" standard also applies to rescission of agency rules. But the Court set a low bar for an agency to meet in making and defending a policy change, holding that an agency need only provide "a reasoned analysis" justifying the action.

The Supreme Court reiterated this standard in [F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 \(2009\)](#), holding that an agency's decision to change a previous policy is not subject to any heightened standard of review. The decision must not be arbitrary and capricious, and the agency must show awareness that it is changing policy and provide good reasons for that change. But, the new rule does not need to be objectively better than the old one. The Court held that it is enough that the agency "*believes* it to be better."

The Court in *FCC v. Fox* identified two factors that would require an agency to provide a more-detailed explanation for a policy change. First, when there are new factual findings that contradict evidence



supporting the previous rule. Second, when the old policy created “significant reliance interests,” i.e. when significant investments were made based on an expectation the old rule would apply. The first factor may be relevant for a new administration if the scientific findings they use to support a new rule are different from the evidence used by the Trump administration to create its rules. In such a case, the agency will need to explain why it is disregarding the previously relied upon evidence.

For cases that do not require a more detailed explanation, the courts have not yet fully explained what constitutes a good reason for changing a policy. The Supreme Court found that the Council on Environmental Quality’s new regulations were entitled to “substantial deference” because the previous regulations had faced significant public criticism and the new regulations were designed to better met the goals of the authorizing statute. [Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 \(1989\)](#). If a new administration can show well-founded criticism of a Trump-era rule or that the scientific reasoning underpinning the rule was flawed, the agency will likely have sufficient reason to issue a new rule.

## Final Rules Pre-Litigation or in Litigation

### FINAL RULE WAS SUBMITTED TO CONGRESS WITHIN THE LAST 60 LEGISLATIVE DAYS

The [Congressional Review Act](#), passed in 1996, creates a procedure for Congress and the President to block recently finalized rules. Under the Act, agencies must submit a report on each final rule to

Congress before the rule can go into effect. Once Congress receives the report, it has 60 legislative days to pass a resolution of disapproval and have it signed by the President. The disapproval resolution only requires a simple majority in both houses, and therefore is not subject to the 60-vote threshold in the Senate typically necessary to avoid a filibuster. If Congress passes and the President signs the resolution, then the rule does not go into effect.

A new administration can use the CRA to nullify Trump-era rules finalized within 60 legislative days of the new administration taking office. This generally translates to a mid-May deadline for final rules preceding the new Congress in January. The new administration will need majority support from both houses of Congress to use the CRA. The impact of the CRA is limited, as a successful resolution will only stop a rule from taking effect. The agency will need to reinstate the rulemaking process to strengthen environmental protections. But this rulemaking may also be limited because the CRA prohibits an agency issuing a rule that is “substantially similar” to a rule Congress previously blocked.<sup>1</sup>

### FINAL RULE THAT HAS NOT TAKEN EFFECT OR COMPLIANCE DEADLINES HAVE NOT PASSED

If the Trump administration’s rule is final but has not taken effect, the responsible agency can delay the rule’s effective date and reconsider the rule. Agencies generally have discretion to delay the implementation of final rules, but such delays

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<sup>1</sup> See *infra* “Obama-Era Rules Nullified by Congress” for a discussion of the CRA’s restrictions.



must follow the APA's requirements and must be reasonable. The agency will need to follow notice-and-comment procedures, meaning it must publish a proposed rule to suspend implementation and/or change compliance dates, solicit public comment, and later issue a final rule after considering comments. The delay cannot be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). Circuit courts ruled against the Trump administration for multi-year delays of rules related to [fuel economy penalties](#) and [appliance efficiency standards](#), finding that there are limits to agency discretion and the statutory authority to delay the effective date of rules. Agencies cannot keep a rule in limbo to avoid rulemaking; they must work to finalize a new rule or allow the original rule to take effect.

If litigation of a rule is ongoing, and its first compliance date has not passed, a new administration can seek a suspension of the litigation based on the agency's intention to reconsider the rule. A suspension of litigation, either through a stay or holding the case in abeyance, can prevent a court from issuing an opinion averse to the new administration's interests. When the Trump administration came into office, EPA published a [notice of its intention to review](#) the Obama-era Clean Power Plan. The D.C. Circuit approved repeated requests for delays of the pending litigation challenging the Clean Power Plan while EPA repealed the Clean Power Plan and crafted a replacement rule over the course of two years. The Court eventually dismissed the Clean Power Plan challenge as moot when EPA finalized the repeal of the Clean Power Plan and issued its replacement. Had the D.C. Circuit upheld the Clean Power Plan, it would have

been much harder for the Trump EPA to [claim](#), as it did, that the plan exceeded the agency's statutory authority and needed to be repealed as unlawful.

Similarly, the agency can request a voluntary remand of a challenged rule. If the agency intends to reconsider and possibly revise the rule, the agency can request that the court send the rule back to the agency without deciding the case on the merits. For example, if environmental groups are suing an agency over a Trump administration rule, a new administration seeking to strengthen environmental protections can seek a voluntary remand to modify the rule in a way that satisfies the challengers' concerns. This tactic, as with seeking a suspension of litigation, will eliminate the risk of an unfavorable decision. It will prevent the court from reaching the merits and potentially upholding the Trump-era rule. But voluntary remand does not pause implementation of the rule. Without a stay, the agency will likely need to work quickly on the new rulemaking to ensure it can be finalized before the previous rule's compliance dates arrive or to minimize harm from reliance on the Trump-era rule.

## Final, Effective Rules with a Ruling on the Merits

A court's reasoning for upholding or invalidating a Trump-era rule will impact whether and how a future administration can change that rule and similar regulations. When reviewing rules, courts often review the agency's interpretation of the relevant statute to ensure the rule aligns with Congressional intent and does not exceed or deviate from the agency's statutory authority. For example, the Clean Water Act directs EPA and the Army Corps



of Engineers to regulate dredging, filling, and discharging pollutants into “navigable waters,” which it defines as “waters of the United States.” The Act does not further define “waters of the United States,” meaning the agencies must interpret that phrase to determine the extent of Clean Water Act jurisdiction. Under both the Obama and Trump administrations, the agencies **promulgated rules** defining “waters of the United States,” and both administrations have been sued over the legality of their respective statutory interpretations.

In assessing the validity of an agency’s statutory interpretation, the court will generally first determine whether the relevant statutory language is unambiguous, having only one clear meaning, or ambiguous, leaving room for multiple interpretations. If the court finds that the statutory provision is unambiguous, then the agency – including under any future administrations – must act according to that clear meaning. If the court finds that the statutory provision is ambiguous, the court will assess whether the agency’s interpretation of the statute is reasonable. If the court finds the interpretation reasonable, it will generally defer to the agency’s expertise and uphold its interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

#### **FINAL RULE UPHELD BY COURT AS FOLLOWING UNAMBIGUOUS STATUTORY PROVISION**

If a court upheld a Trump administration rule by finding that the relevant statutory provision is unambiguous, and the rule is in accordance with the provision, then the agency cannot promulgate a new rule based on a different interpretation of the

statute. A court’s finding that the statutory provision has one clear meaning “unambiguously [forecloses]” any different interpretation. *National Cable & Television Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Such a decision creates a significant barrier to any future administration that wants to modify a rollback by creating a rule based on a different interpretation. In order to overcome this, Congress would need to amend the statutory provision.

The Trump administration is **advancing this type of argument** in the litigation over the repeal of the Clean Power Plan and its replacement with the Affordable Clean Energy Rule. The administration alleges that provisions of the Clean Air Act, which require EPA to set carbon dioxide emissions standards for existing power plants, are unambiguous. EPA argues that the provisions only allow the agency to regulate emissions with control technologies that can be applied directly to a coal-fired power plant itself. If the D.C. Circuit agrees with this argument, then a future administration will be unable to implement a new rule that takes a more expansive approach, such as a rule that considers the interconnected electricity grid and requires power plants to shift generation to cleaner energy sources like the Clean Power Plan.

#### **FINAL RULE UPHELD AS REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY PROVISION**

If a court upheld a Trump administration rule by finding that the relevant statutory provision is ambiguous, and the rule is based on a reasonable interpretation of the provision, then the agency will be able to modify or replace the rule.



Any new rule must be supported by a reasonable interpretation of the relevant statute and sufficient factual evidence and analysis. As explained earlier, an agency’s choice to change a previous policy is not subject to any heightened standard of review. The agency need only demonstrate that the new rule is not arbitrary or capricious, and that there are good reasons for the change.

**FINAL RULE INVALIDATED FOR FAILING TO FOLLOW UNAMBIGUOUS STATUTORY PROVISION**

If a court invalidated a Trump administration rule by finding that the relevant statutory provision is unambiguous, but the rule is not in line with the provision, then the agency will need to either begin the rulemaking process again or abandon the effort.

If the Trump administration does not finalize a replacement rule before a new administration comes into office, then the new administration can take control of the process and develop a new rule that is consistent with the unambiguous statutory provision. But the agency will be bound by the court’s interpretation. If the court read the statute to require the agency to act in a more environmentally-protective way, the new administration will be on strong legal footing to implement stronger environmental protections.

If the court read the statute as prohibiting a more environmentally protective rule, a future administration may be blocked from developing similar regulations under the same statutory provision. In [Mexichem Fluor v. EPA, 866 F.3d 451 \(D.C. Cir. 2017\)](#), the D.C. Circuit invalidated a portion of an Obama-era rule that would have phased out hydrofluorocarbons (HFCs). The court found that

the agency’s interpretation of its statutory authority conflicted with the statute’s clear meaning. The Trump administration later invalidated the Obama-era rule’s HFC listings.<sup>2</sup> The D.C. Circuit’s 2017 ruling presents a significant barrier to developing a rule to phase out HFCs using a similar approach under the same statutory provision.

**FINAL RULE INVALIDATED AS UNREASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE**

If a court invalidated a Trump administration rule by finding that the relevant statutory provision is ambiguous, but the rule is not based on a reasonable interpretation of the provision, the agency will need to begin the rulemaking process again. The agency will have some flexibility to interpret the ambiguous statutory language when crafting its new rule.

This outcome is uncommon because courts tend to defer to an agency’s interpretation of ambiguous statutory language. Yet the Supreme Court made such a finding in [Michigan v. EPA, 135 S.Ct. 2699 \(2015\)](#). The Court reviewed EPA’s interpretation of the Clean Air Act’s mandate to regulate hazardous emissions from power plants if it is “appropriate and necessary” to do so. The agency concluded that it should not consider costs when determining

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<sup>2</sup> A coalition of states and environmental groups challenged EPA’s response to the decision in the D.C. Circuit. The court vacated the Trump-era response rule, holding that the agency improperly amended the Obama-era rule without following notice-and-comment procedures. EPA was required to follow those procedures because it went beyond amending the invalidated portion of the rule and removed the HFC listings. See [Natural Resources Defense Council v. Wheeler](#), No. 18-1172, slip op. at 27 (D.C. Cir. Apr. 7, 2020).



whether it was appropriate to regulate. The Court held that this was an unreasonable interpretation of the Act, even though the phrase “appropriate and necessary” was vague enough to allow for multiple interpretations. The Court remanded the rulemaking to EPA. EPA then considered costs and issued a supplemental rulemaking. If the court remands a Trump-era rule because its interpretation of an ambiguous provision is not reasonable, a new administration can start fresh with a different interpretation, as long as it is reasonable.

A court can also remand a rule as an unreasonable interpretation of an ambiguous provision if there is insufficient legal or factual justification for the rule. In this case, the court would require the agency to offer better support for the rule or begin the rulemaking process again. While courts rarely make these determinations, there is potential for this outcome in challenges to Trump administration rules. If this occurs, a new administration can restart the rulemaking process and develop a rule that is more environmentally protective.

## Final Rules Invalidated on Procedural or Other Grounds

If a court invalidated a final rule due to a procedural failure, a new administration may be able to quickly change course. If the Trump administration did not follow the APA’s procedural requirements, such as providing adequate public notice and opportunity for comment, then a court could invalidate the rule without determining whether the rule itself was lawful. If the Trump administration is still fixing a procedural deficiency when a new administration comes into office, the agency can use that as an

opportunity to revise or replace the rule in question.

A rule may also be invalidated as “arbitrary and capricious” under the APA based on the record compiled by the agency or deficiencies in the agency’s reasoning. Such a ruling gives a new administration more latitude to strengthen the record or publish a rule that better aligns with the existing record. In 2015, the Obama administration finalized a rule regulating coal ash storage and disposal. In 2018, the D.C. Circuit found that one feature of the Obama-era rule was arbitrary and capricious in [\*Utility Solid Waste Activities Group v. EPA \(USWAG\)\*, 901 F.3d 414 \(D.C. Cir. 2018\)](#) because the agency failed to adequately consider risks to public health and the environment. The court sent the rule back to EPA to rewrite the invalidated section. The Trump EPA published a proposed rule in December 2019 that is meant to be responsive to the D.C. Circuit’s decision.



## Proposed Rules

A successor administration will have the greatest latitude to change a proposed rule that has not been finalized by the end of the Trump administration. Agencies have broad discretion to withdraw or change course on proposed rules. If the proposal would replace an existing regulation, a new administration can end the rulemaking process and keep the existing regulation in effect. The agency will not need to clear any procedural hurdles under the APA because this action will maintain the legal status quo. If the proposal would establish a new regulation where no current regulation exists, the next administration can withdraw it and propose a different rule or modify the Trump-era proposal.

## Obama-Era Rules Nullified by Congress

In 2017, Congress and President Trump used the CRA to block multiple [Department of Interior rules](#). A new administration will need to be mindful of the CRA's restrictions if it intends to implement similar rules. The CRA bars agencies from promulgating any rule that is in “substantially the same form” as the rejected rule, but it does not provide a definition of “substantially the same form.”

The issue is further complicated by the fact that the CRA explicitly bars a court from reviewing any “determination, finding, action, or omission” under the CRA. It is unclear whether this provision covers an agency’s issuance of a new rule. The D.C. Circuit has said that the Act’s ban on judicial review includes whether an agency has complied with the Act, [Montanans For Multiple Use v. Barbouletos](#), 568 F.3d 225, 229 (D.C. Cir. 2009). But multiple circuit and district courts have come out on both sides of this issue.<sup>3</sup> If a new administration creates a rule similar to one disapproved by Congress, it is an open question whether a court could review the rule to enforce the “same form” restriction.

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<sup>3</sup> In two cases in 2019, district courts came to completely opposite conclusions on the question of whether the CRA’s judicial review prohibition applies to agency action related to the CRA. In *Tugaw Ranches v. United States Dep’t of the Interior*, 362 Fed.Supp.3d 879 (D. Idaho), the Idaho District Court found that the bar on judicial review in the CRA does not apply to agency action. But in *Kansas Natural Resources Coalition v. United States Dep’t of the Interior*, 982 Fed. Supp.3d 1179 (D. Kan.), the Kansas District Court held the opposite, finding the court was barred from reviewing the agency’s failure to send a rule to Congress.



## Guidance Memos and Executive Orders

A new administration will have broad authority to revise both guidance memoranda and executive orders. Guidance memoranda are typically issued by an agency head or legal office and state the agency's interpretation of a law or regulation. Executive orders are issued by the President and often declare policy priorities or direct agencies to act in specific ways. These documents are only valid to the extent they do not contradict existing laws and regulations.

Guidance memoranda and executive orders are easier to change because they have less legal force than regulations. A new President can rescind an existing executive order or alter it by signing a new one that changes the policy or mandate from the previous order. Similarly, the agency head can change a guidance memo by issuing a new memo or rescinding an existing memo as long as the substance of the memo is within the agency's legal authority. For example, the Department of Interior Solicitor issued an opinion in 2017 reversing an Obama-era opinion that incidental takes of migratory birds violate the [Migratory Bird Treaty Act](#).<sup>4</sup>

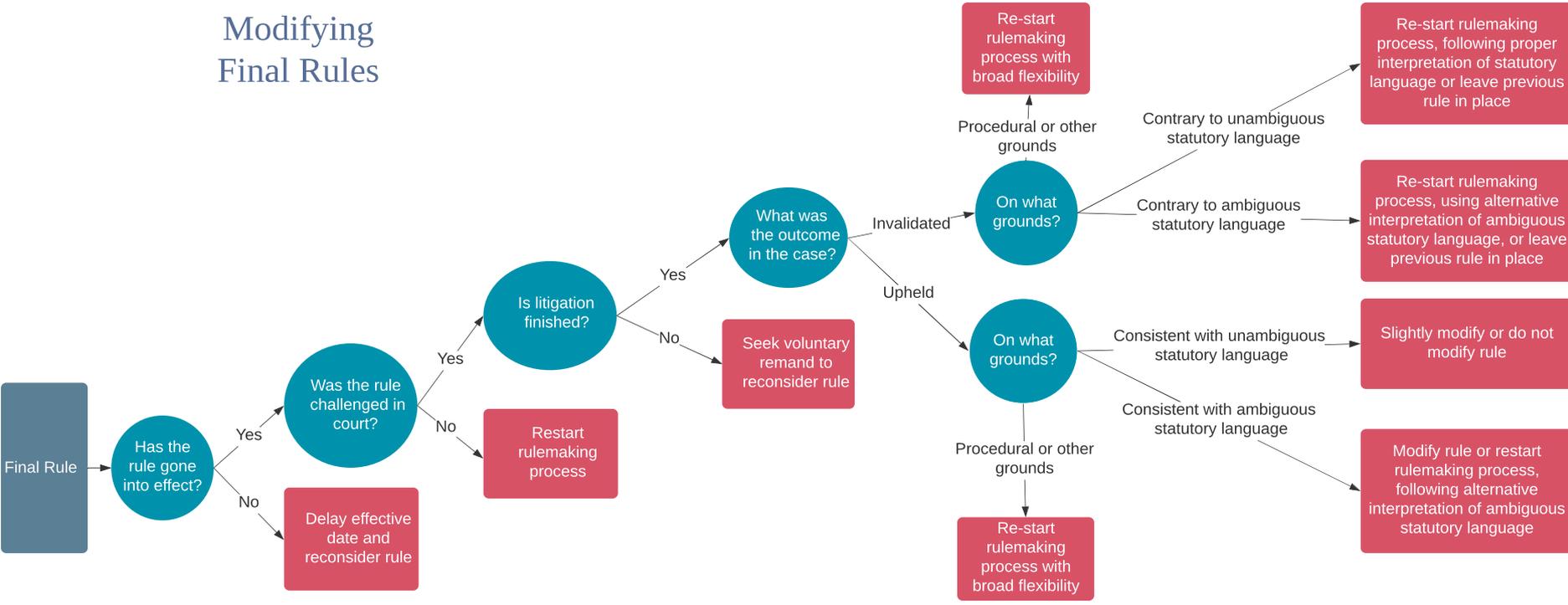
## Conclusion

The Trump administration has used many statutory and administrative tools to loosen and remove environmental protections. Undoing these deregulatory efforts will be a large undertaking for a future administration. It is difficult to change course quickly because of the procedural, legal, and factual requirements outlined above. But those requirements ensure that agencies engage in reasoned rulemaking that is supported by sufficient evidence.

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<sup>4</sup> The Department of Interior issued a statement on January 30, 2020 announcing that the agency will release a proposed rule reflecting this change. Issuing a rule that has the same language and effect as an earlier guidance memo is a common way for agencies to put their statutory interpretations on stronger legal footing for subsequent challenges.

# Modifying Final Rules



\*This chart does not include the use of the Congressional Review Act.